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U. S. Supreme Court, D. S.
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. **782**.

COLONIAL MILLING COMPANY, PETITIONER,
VS.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

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Of Counsel.

YUCATA COUNTY

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YUCATA COUNTY

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

May It Please the Court:

The petitioner, Colonial Milling Company, a corporation, respectfully shows to this Honorable Court:

I.

Summary Statement of the Matter Involved.

The petitioner, Colonial Milling Company, is a corporation located at Nashville, Tennessee, and is engaged in the milling of wheat into flour and the sale of its product to retail dealers in its trade territory. During the tax period of July 9, 1933, to March 31, 1935, inclusive, petitioner paid the processing tax on wheat which it pur-

chased and ground into flour. This proceeding involves petitioner's claim for a refund of a portion of the processing tax so paid.

Decision of the Processing Tax Board of Review.

Proof was taken and the matter was first heard by the Processing Tax Board of Review as provided in Section 906(g) of the Revenue Act of 1936.

Five members of the Board heard the case. Petitioner offered proof showing that during the tax period it sold 189,417 barrels of flour. In sales involving 54,017 barrels, petitioner admitted that it sold its product at a price which included the tax and that the tax *with respect to these sales* was shifted to the purchasers. No claim was made for a refund of these taxes. With respect to the *remaining sales*, involving 135,400 barrels, petitioner offered undisputed evidence showing that its attempt to include the tax in the sale price was unsuccessful and that the price actually received for the product in these sales was less than the actual cost plus the tax to the extent of \$45,482.64 (R. 168-170).

Petitioner analyzed each separate sale during the *entire tax period* and ascertained the cost of the flour sold, including the tax, and offered in evidence detailed proof which showed that it shifted the burden of the tax in the sale of the 54,017 barrels of flour, but absorbed the tax in whole or in part in the sale of the 135,400 barrels (R. 131-135).

Respondent offered no proof to the contrary.

Three members of the Board concurred in denying the claim for refund, two members writing vigorous dissenting opinions.

In the majority opinion Member Crewe rejected the evidence first upon the ground that it used conversion factors and contained approximations and therefore did not constitute actual figures, and secondly upon the ground that petitioner was not entitled to a refund of the taxes borne by petitioner if it operated at a net profit

during the tax period equal to the taxes which it absorbed (R. 72-73).

Member Schwartz concurred in the result *only* upon the second ground stated by Member Crewe.

Member Edwards concurred in the result solely upon the ground that petitioner was not entitled as a matter of law to show absorption of the taxes *by actual proof* with respect to each sale during the tax period (R. 71).

Four out of the five Members admitted that petitioner's proof established as a matter of fact that it failed to shift the burden of the tax in whole or in part in the sale of its product to the extent claimed by the petitioner. Three of the Members held that net profits made by the petitioner during the tax period should be used to offset taxes admittedly absorbed by petitioner, and the Board's adverse decision was predicated solely upon this question of law with respect to which two Members joined in a vigorous dissenting opinion (R. 68-97).

Decision of the Circuit Court of Appeals for the Sixth Circuit.

On the petition to review the decision of the United States Processing Tax Board of Review denying refund, the United States Circuit Court of Appeals for the Sixth Circuit rendered its opinion on December 10, 1942 (R. 275). The Circuit Court of Appeals held that petitioner's proof established as a fact that with respect to the sales involving 135,400 barrels of flour the petitioner failed to shift to its vendees the burden of the processing tax in these particular transactions. The court further held, however, that there was substantial evidence to show that with respect to the sales involving 54,017 barrels of flour (where petitioner admitted that it shifted the burden of the tax), sufficient net profits were realized to offset the amount of the tax borne by the petitioner in the other sales. The court held in effect that petitioner could not recover processing taxes absorbed by it if the proof

further showed that the petitioner operated at a net profit during the tax period, saying:

“* * * The statute conditions a recovery under it upon proof that the economic burden of the tax has been borne by the claimant.”

Further, the court conceived the record to show that the Processing Tax Board of Review in the *majority* opinion had found that petitioner's evidence did not satisfactorily show that it had borne any part of the tax burden, as will appear from the following quotation from the opinion:

“* * * As to the individual transactions presented, petitioner's evidence that it has absorbed the tax may be cogent, but if the Board, in view of the gap in the evidence, is not satisfied, as here, that petitioner has not shifted the burden of the tax, his finding is controlling in this court.”

The record affirmatively discloses that the Board made no such adverse finding of fact. Member Crewe declined to consider petitioner's evidence upon the ground that it was incompetent, and the Circuit Court of Appeals for the Sixth Circuit held that Member Crewe was in error in so doing. The adverse decision of the Board was the result of the concurrence of Members Schwartz and Crewe on the legal proposition that net profits should be used to offset taxes admittedly absorbed plus the concurrence of Member Edwards upon the wholly different legal proposition that petitioner was not entitled as *a matter of law* to show absorption of the taxes by actual proof with respect to each sale during the tax period (R. 70-73).

Reasons Relied Upon for the Issuance of the Writ.

I.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case holds

in effect that no recovery can be had under the statute with respect to the portion of processing taxes shown by the undisputed evidence to have been absorbed by the petitioner if it further appears that petitioner during the tax period nevertheless realized net profits sufficient to offset the unshifted taxes upon the theory that the existence of a net profit shows that "the *economic* burden of the tax was not borne by the petitioner."

Such a construction of the statute is directly contrary to Section 907(e), which permits a recovery of the tax upon proof of the ACTUAL extent to which the claimant shifted to others the burden of the processing tax, without regard to nebulous theories relating to the shifting of the *economic* burden. The determination of the economic burden as distinguished from the actual shifting of the tax is contrary to the construction of the statute by this Court in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 81 L. Ed. 1143, *Wilson & Co. v. United States*, 311 U. S. 104, 85 L. Ed. 71, and is contrary to the construction of a similar statute by this Court in *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 78 L. Ed. 859.

II.

The construction of the statute by the learned Circuit Court of Appeals for the Sixth Circuit so as to require, in addition to the showing of the actual facts with respect to the shifting of the burden of the tax, a further determination with respect to the ultimate economic incidence of the tax involving a hopeless conflict of economic theories on the ultimate incidence of taxation, would place an impossible burden upon the claimant which would render the statute in violation of the due process clause of the Fifth Amendment of the Constitution of the United States as expressly pointed out by this Court in *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 78 L. Ed. 859, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 81 L. Ed. 1143.

III.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case in requiring proof as to the distribution of the ultimate economic burden of the tax as distinguished from the actual shifting of the tax by inclusion in the price, or otherwise, and in requiring absorbed taxes to be offset by net profits realized in other transactions, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Cones & Son Mfg. Co. v. United States*, 123 F. 2d 530, and with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Regensburg & Sons v. Helvering*, 130 F. 2d 507.

IV.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case in construing the statute as requiring the petitioner to affirmatively show that it has borne the economic burden of the tax in addition to showing that it actually absorbed the tax in whole or in part by its inability to include it in the realized sales price of its product, and in holding that net profits realized by petitioner in separate transactions during the tax period may be used to offset absorbed taxes in other transactions during the same period, is a decision on an important question of general law in a way probably untenable and in conflict with the weight of authority; and it is likewise a decision upon an important question of Federal law which has not been, but should be, settled by this Court.

Your petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the entire record of this cause in the United States Circuit Court of Appeals for the Sixth Circuit, specification of error, and brief and argument, giving in more amplified form the reasons why the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was erroneous

and should be reversed, and respectfully asks that the certified copy of the record, specifications of error, brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Circuit Court of Appeals for the Sixth Circuit.

Prayer for Writ.

Wherefore your petitioner, Colonial Milling Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case cited on its docket as No. 9173, styled Colonial Milling Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, and that said judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Court may deem meet and just; and your petitioner will ever pray.

Colonial Milling Company,
By CECIL SIMS, -
Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.